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IN THE

Supreme Court of the United States

October Term, A. D., 1953.

346 U.S.
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No. 273

U. S. PRINTING & NOVELTY CO., INC., a Corporation, and BENJAMIN BLUSH and JACK BLUSH,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

U. S. Printing & Novelty Co., Inc., a Corporation, and Benjamin Blush and Jack Blush, individually and as officers and directors of said Corporation, respectfully petition this Honorable Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Petitioners are manufacturers of push cards and punch boards.

This petition for writ of certiorari is filed for a review of a decision of the United States Court of Appeals for the District of Columbia Circuit, affirming, with certain modifications as to the language thereof, an order issued by the Federal Trade Commission (hereinafter referred to as the Commission) requiring petitioners to cease and desist from selling or distributing in interstate commerce certain push cards, punch boards or other lottery devices, such sale or distribution having been held by the Commission to be unfair acts and practices within the intent and meaning of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 USCA 45).

Petitioners' brief in support of this petition is annexed hereto, and said brief, at Page 6 (Statement of the Case) more completely and fully summarizes the case and proceedings to date.

Petitioners' intend to rely on only one point—the error of the Court of Appeals in holding that the decision of this Court in *United States v. Halseth,* 342 US 277, a case involving an alleged violation of the Postal Lottery Statute (Sec. 213 of the Criminal Code of 1909, 35 Stat. 1129; 18 USCA 336), is not applicable to a proceeding under the Federal Trade Commission Act.

JURISIDCTIONAL STATEMENT

Jurisdiction of this Honorable Court is invoked under the provisions of the Act of June 25, 1948, 62 Stat. 928 (28 USCA 1254).

QUESTION PRESENTED

Does the Commission have authority to restrain the selling and distribution in interstate commerce of printed material which can or may be used by others than the manufacturer thereof in the distribution of merchandise by lot or chance?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The United States Court of Appeals for the District of Columbia Circuit in affirming the Federal Trade Commission's cease and desist order against petitioners, with certain modifications as to the language thereof, held that the recent decision of this Court in *United States v. Halseth,* supra, is not applicable to the interstate distribution of lottery devices which "are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme," notwithstanding the decision of this Court in the *Halseth* case that "if punchboards are to be added to the category of devices to be excluded (from the mails and interstate commerce), it is for Congress to make the addition."

The decision of the Court of Appeals is clearly in conflict with the decision of this Court as aforesaid.

It is respectfully submitted that a writ of certiorari should issue in this matter.

HORACE J. DONNELLY, JR.
Attorney for Petitioners

IN THE

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U. S. PRINTING & NOVELTY CO., INC., a Corporation, and BENJAMIN BLUSH and JACK BLUSH,
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VS.

FEDERAL TRADE COMMISSION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This case comes before this Honorable Court on petition for writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit, wherein an order to cease and desist issued by the Federal Trade Commission (hereinafter referred to as the Commission) against petitioners, based on Sec. 5 of the Federal Trade Commission Act (Act of Sept. 26, 1914, 38 Stat. 719, as amended; 15 USCA 45), was affirmed. The case in the court below is reported in

204 F.2d 737. The opinion of the Circuit Court is set forth at R. 22.

STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under the provisions of the Act of June 25, 1948, 62 Stat. 928 (28 USCA 1254).

STATEMENT OF THE CASE

Under date of April 1, 1949, the Federal Trade Commission issued its complaint (R. 2-6) charging that petitioners manufacture, sell and distribute in interstate commerce to manufacturers of and distributors in merchandise (who in turn sell their merchandise, together with said push cards and punch boards, to retailers), devices commonly known as push cards and punch boards; that such push cards and punch boards are so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming public; that many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by such methods; that the sale of merchandise to the purchasing public by such methods teaches and encourages gambling among members of the public, all to the injury of the public; that the sale of merchandise by such methods is a practice which is contrary to an established public policy of the Government of the United States and in violation of criminal laws, and constitutes unfair acts and practices; that the sale and distribution of such push cards and punch boards by petitioners supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise; and that petitioners thus supply to, and place in the hands of others the

means of, and instrumentalities for, engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.[1]

Petitioners filed a (substitute) answer (R. 11) on July 23, 1950, admitting all of the material, well-pleaded allegations of the complaint, and waiving the taking of testimony and other procedure, but reserving the right to appeal from any decision and order issued by the hearing examiner or the Commission. It was agreed between counsel, with the approval of the hearing examiner, that the decision in the matter would not be issued until after a determination had been made by the Commission in a similar proceeding (Federal Trade Commission v. Superior Products, Docket No. 5561). From an adverse initial decision issued by the hearing examiner under date of February 15, 1952, petitioners appealed to the Commission.

Upon the sustaining by the Commission of the initial decision of the hearing examiner, and the issuance by

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[1] The pertinent provisions of said Act provide: "(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. The Commission is empowered and directed to prevent persons * * * or corporations, * * *, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. (b) Whenever the Commission shall have reason to believe that any such person, * * *, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, * * *, or corporation a complaint stating its charges in that respect and containing a notice of hearing * * *. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections * * * of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, * * *, or corporation an order requiring such person, * * *, or corporation to cease and desist from using such method of competition or such act or practice."

the Commission, under date of September 4, 1952, of its final decision and order (R. 12-17), petitioners filed, on November 8, 1952, with the United States Court of Appeals for the District of Columbia Circuit, their petition to review and set aside the order of the Federal Trade Commission (R. 18-21).

Thereafter, under date of June 4, 1953, the United States Court of Appeals for the District of Columbia Circuit entered its decision and judgment (R. 22-24) affirming the Commission's cease and desist order, with certain modifications as to the language thereof.

SPECIFICATION OF ERROR INTENDED TO BE ARGUED

The Court erred in holding that the Federal Trade Commission has authority to prohibit the sale and distribution in interstate commerce of printed material which may or can be used by others to sell or distribute merchandise to the public by means of a game of chance, gift enterprise or lottery scheme, holding that the decision of this Court in *United States v. Halseth,* 342 US 277, is not applicable to the interstate sale or distribution of push cards, punchboards, or other lottery devices, which "are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme."

ARGUMENT

This Court has previously held that the mere mailing of paraphernalia which may be used in setting up lottery schemes does not violate the Act of March 4, 1909, known as the Postal Lottery Statute, (Sec. 213 of the Criminal Code of 1909, 35 Stat. 1129, 18 USCA 336, 1946 Edit.,

now Sec. 1302),[2] since there is no lottery in existence at the time of the mailing, and neither the addressee nor the sender was engaged in the operation of a lottery or similar scheme, and that the lottery or similar scheme would come into existence only if the addressee put the paraphernalia into operation. *U. S. v. Halseth,* supra, citing *France v. United States,* 164 US 676, construing the so-called Interstate Lottery Carriage Act of March 2, 1895 (28 Stat. 963).

This Court further pointed out in the *Halseth* case that "Congress has had before it many times the question of what gambling devices and paraphernalia it would exclude from the mails *and interstate commerce* (emphasis supplied), and only recently has it passed an act concerning the subject" (referring to the Act of January 2, 1951, P.L. 906, 15 USCA 1171). This Court further commented that, "If punchboards are to be added to the category of devices to be excluded (from the mails and interstate commerce), it is for Congress to make the addition."

Since there has been no additional legislation enacted on the subject since the decision of this Court in the Halseth case, and since both the instant case and the Halseth case involve the same issue—the right to distribute push cards and punch boards through the mails and in interstate commerce—petitioners urge that it was error for the Court of Appeals to hold that the decision of this Court in the Halseth case is not applicable to the instant case, and, therefore, does not govern the determination of the question as to whether or not the mere sale or

[2] The pertinent provisions of the Act provide: "No letter, package, postal card, or circular concerning any lottery * * * or similar scheme offering prizes dependent in whole or in part upon lot or chance * * * shall be deposited in or carried by the mails * * *. Whoever shall knowingly deposit * * * anything to be * * * delivered by mail in violation of * * * this section * * * shall be fined * * * or imprisoned * * *."

distribution of push cards and punch boards in interstate commerce, constitutes a violation of the Federal Trade Commission Act.

CONCLUSION

Wherefore, petitioners respectfully request that this Honorable Court grant their petition; issue Its writ of certiorari to review the judgment of the Court of Appeals; hear, consider and determine the question presented; and reverse the judgment and order of the Court of Appeals insofar as that judgment and the holding of that Court are adverse to the petitioners' contentions.

HORACE J. DONNELLY, JR.
Attorney for Petitioners

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 273

U. S. PRINTING & NOVELTY CO., INC., A CORPORATION, AND BENJAMIN BLUSH AND JACK BLUSH, PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 22) is reported in 204 F. 2d 737. The decision of the Federal Trade Commission (R. 12A) is unreported.

JURISDICTION

The final decree of the Court of Appeals was entered on June 4, 1953 (R. 24). The petition for a writ of certiorari was filed on August 19, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Federal Trade Commission has authority to restrain, as an unfair practice in commerce, the interstate sale and distribution of push cards, punchboards and other lottery devices which are designed for use and are in fact used by the ultimate purchasers as a means of selling merchandise at retail through games of chance.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

In April 1949, the Federal Trade Commission issued a complaint charging petitioners with unfair acts and practices in interstate commerce, in violation of Section 5 of the Federal Trade Commission Act (R. 2A). Petitioners admitted all material allegations of fact (R. 11A), and the

Commission entered findings which may be summarized briefly as follows:

Petitioners are engaged in the manufacture, sale and distribution in interstate commerce of devices known as push cards and punchboards (R. 13A). These devices are designed to be used as a means of selling various items of merchandise, and they are distributed, directly or indirectly, to retail merchants who employ them for that purpose (R. 13A–14A). The method by which the devices are operated is simple. Members of the consuming public are offered the opportunity to purchase a "chance." The buyer of a "chance" is entitled to a single "push" or "punch," which discloses a previously concealed number. Certain specified numbers entitle purchasers to designated articles of merchandise without additional cost. The person securing a winning number receives these articles of merchandise at much less than the normal retail price. Persons who do not secure winning numbers receive nothing for their money other than the privilege of making the "push" or "punch." (R. 14A–16A.)

The Commission further found that petitioners' devices fostered gambling; that members of the purchasing public have been encouraged to patronize retail dealers who distribute merchandise in conjunction with petitioners' games of chance; and that retail dealers, in turn, have been induced to trade with manufacturers and jobbers who

distribute merchandise in conjunction with petitioners' push cards and punchboards (R. 16A).

Concluding that petitioners' activities constitute unfair acts and practices in commerce and that they are prejudicial to the public, the Commission entered the cease and desist order which is the subject of this proceeding (R. 17A). The Court of Appeals affirmed the order *per curiam*.[1]

ARGUMENT

This Court has long since sustained the power of the Commission to ban a merchandising-through-gambling scheme. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 313. And seven Courts of Appeals—all of those which have had occasion to pass upon the matter—have upheld the Commission's power to act in precisely the circumstances disclosed by the instant case. *Hamilton Manufacturing Co.* v. *Federal Trade Commission*, 194 F. 2d 346 (C. A. D. C.); *Globe Cardboard Novelty Co.* v. *Federal Trade Commission*, 192 F. 2d 444 (C. A. 3); *Consolidated Manufacturing Co.* v. *Federal Trade Commission*, 199 F. 2d 417 (C. A. 4); *Chas. A. Brewer & Sons* v. *Federal Trade Commission*, 158 F. 2d 74 (C. A. 6); *Zitserman* v. *Federal Trade Commission*, 200 F. 2d 519 (C. A. 8); *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (C. A. 9); *Gay Games, Inc.* v.

[1] The court ordered a minor modification in the language of the cease and desist order (R. 23–24). The terms of the order, however, are for present purposes immaterial, the challenge here being directed solely to the legal conclusion that there was a violation of the Act.

Federal Trade Commission, 204 F. 2d 197 (C. A. 10).[2]

Ignoring the decisions involving Commission orders, petitioners rely exclusively upon *United States* v. *Halseth,* 342 U. S. 277, a criminal case which arose under the Postal Lottery Act, 35 Stat. 1129, 18 U. S. C. (1946 ed.) 336 (now 18 U. S. C. 1302). The inapplicability of the *Halseth* decision was conclusively demonstrated by the Court of Appeals for the Ninth Circuit in *Lichtenstein* v. *Federal Trade Commission,* 194 F. 2d 607, certiorari denied, 344 U. S. 819. There, that court, in rejecting the same contention, pointed out (194 F. 2d at 610–611) that in 1951 Congress adopted a criminal statute (Act of January 2, 1951, 64 Stat. 1134, 15 U. S. C., Supp. V, 1171 *et seq.*), forbidding the interstate transportation of slot machines and certain other mechanical devices suitable for gambling to states in which gambling is illegal; that Congress was put on notice, before passing the legislation, that the Federal Trade Commission had issued cease and desist orders aimed at the distribution of devices designed for use in merchandising-through-gambling schemes; and that Congress, implicitly approving the Commission's course, incorporated a proviso in the law—"nothing in this Act shall be construed to interfere with or reduce the au-

[2] Two factually similar cases are pending on petitions for writ of certiorari. *Feitler, et al.* v. *Federal Trade Commission,* No. 74, this Term; *Universal Manufacturing Co., et al.* v. *Federal Trade Commission,* No. 252, this Term.

thority, or the existing interpretations of the authority, of the Federal Trade Commission under the Federal Trade Commission Act, as amended" (Sec. 2, 15 U. S. C., Supp. V, 1172).

Further, it is completely clear that the *Halseth* case held simply that the criminal statute there involved, which makes it an offense to mail material "concerning any lottery," is applicable only to an existing lottery, and that the mere mailing of material usable in the conduct of a lottery is not a violation of that Act. Obviously, the Federal Trade Commission's power to deal with unfair acts and practices in commerce, and to protect the public and competitors by cease and desist orders, is in no wise dependent upon whether such acts are crimes under other laws.

CONCLUSION

The decision below is clearly correct, there is no conflict of decisions, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1953.

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